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SUPREME COURT U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 208

GENERAL DRIVERS ALLIED AUTOMOTIVE AND PETROLEUM LOCAL UNION NO. 498, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, C. B. BUTLER, INDIVIDUALLY, AND AS PRESIDENT OF SAID LOCAL NO. 498, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR FLOYD M. HIGGINS, OSCAR WADDELL AND BEULAH LAMUEL IN OPPOSITION.

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OPINION BELOW.

The opinion and decision of the court below (Appendix to the Petition, pp. 15-44) is officially reported at 188 Kan. 11, 360 P. 2d 456 (1961). The Memorandum Opinion and Journal Entry of the trial court (App. to the Pet., pp. 45-54) is unreported.

JURISDICTION.

The decree of the court below was entered on March 17, 1961, and a petition for rehearing was denied by that court on April 12, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (1952).

QUESTIONS PRESENTED.

1. Whether the controversy is moot because of the circumstances set forth in the statement of the case, paragraph D, p. 3 *infra*.

2. Whether jurisdiction of this Court has been properly invoked under 28 U. S. C. Sec. 1257.

3. Whether the decision of the Kansas Supreme Court sought to be reviewed decided a federal question of substance not heretofore determined by this Court, or decided such a question in a way probably not in accord with applicable decisions of this Court, within the meaning of Rule 19 (1)(a) of this Court.

STATEMENT OF THE CASE.

A. The Facts.

The statement of the facts leading to the filing of respondents' petition in the District Court of Wyandotte County, Kansas, as set forth in the petition (Pet., pp. 5-7) is accurate.

B. The District Court's Opinion and Decree.

In addition to the facts set forth in the petition (Pet., pp. 7-8), the motion to dismiss filed in the District Court by petitioners herein was treated by the parties and the trial court as a demurrer (Pet., pp. 16, 51).

C. The Kansas Supreme Court's Opinion and Decree.

The decision of the Kansas Supreme Court reversed the ruling of the lower court. Under Kansas law, this reversal of the order sustaining the demurrer had the same effect as overruling of the demurrer in the trial court. Contrary to the statement of facts in the petition (Pet., pp. 8-9) and as more fully set forth in the argument herein (*infra*, pp. 5-7), it was not necessary that a remand be included therein, and the Kansas Supreme Court decision did not amount to the granting of a motion for summary judgment or a declaratory judgment, but left the proceeding in the trial court awaiting the filing of subsequent pleadings or trial.

D. The Cessation of Operations of Cardinal Manufacturing Company, Inc.

The title of the case in the Kansas courts was "Higgins, et al. v. Cardinal Manufacturing Company, Inc., and General Drivers, Allied Automotive and Petroleum Local Union No. 498, IBT, et al., No. 42055, March 17, 1961" (Pet., p. 15). Cardinal Manufacturing Company, Inc. was the employer company which had contracted with the labor union here involved; plaintiffs were employees of Cardinal. Prior to the filing of the petition for writ of certiorari herein, Cardinal ceased operations and dissolved; all of its employees, including respondents here and other employees covered by the contract, which included the agency shop provisions the enforcement of which was restrained, had been terminated. That contract is not now applicable to any employees.

Respondents disclose the above facts which may raise a question as to whether the instant case is moot, but do not advocate dismissal of the petition for writ of certiorari on this ground.

ARGUMENT.

I. SINCE THE DECISION OF THE KANSAS SUPREME COURT IS NOT FINAL, THE JURISDICTION OF THIS COURT HAS NOT BEEN PROPERLY INVOKED UNDER 28 U. S. C. SEC. 1257.

The decision of the Kansas Supreme Court sought to be reviewed is not a final judgment or decree within the meaning of 28 U. S. C. Sec. 1257. Therefore petitioners' attempt to invoke the jurisdiction of this Court under that section (Pet., p. 2) is improper.

The case arises on a petition by respondents to enjoin application of a contract provision and to secure a declaratory judgment. In accordance with Kansas practice, Kan. Gen. Stat. Ann. Sec. 60-705 (1949), p. 13 *infra*, the motion to dismiss filed by petitioners herein was treated by the parties and the trial court as equivalent to a demurrer since it challenged only the sufficiency of the petition to state a cause of action and the jurisdiction of the court as to the subject matter (Pet., pp. 16, 51). The trial court entered an order (Pet., pp. 51-4) sustaining petitioners' motion to dismiss, hereinafter referred to as petitioners' demurrer. On appeal to the Supreme Court of the State of Kansas, the order sustaining the demurrer was reversed.

For a decision of a state appellate court to be final within the meaning of 28 U. S. C. Sec. 1257, it must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court has directed. See *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947).

Applying its general rule that the overruling of a de-

murrer is not a final judgment for the purpose of Supreme Court review, this Court has ruled that a decision of the Kansas Supreme Court sustaining a demurrer in a civil suit, where the trial court had not dismissed the suit, lacked the finality requisite to sustain a writ of error. The basis for this decision—that the cause was left standing for such proceedings as might be had by amendment to the petition or entry of final judgment—is equally applicable here. *Missouri & Kansas Interurban Ry.* v *City of Olathe*, 222 U. S. 185 (1911). If a judgment sustaining a demurrer is not a final order, *a fortiori* an order denying a demurrer is not final.

Moreover, under established Kansas law a ruling on a demurrer is not a final judgment. Petitioners, the demurrants, not only may plead defenses other than those set forth in their demurrer but also are free to raise by way of defense the same matters considered on demurrer. See Kan. Gen. Stat. Ann. Secs. 60-707, 60-758 (1949), p. 13 *infra*; *Shields* v. *State Highway Comm'n*, 178 Kan. 342, 286 P.2d 173 (1955); *Miller* v. *Whistler*, 153 Kan. 329, 110 P.2d 744 (1941). Thus the order in this case is not a final determination of the rights of the parties and does not conform to the standards required for a final judgment under the applicable Kansas statute. See Kan. Gen. Stat. Ann. Sec. 60-3101 (1949), p. 13 *infra*.

The fact that Kansas law specifically makes a ruling on a demurrer appealable does not import finality. Kan. Gen. Stat. Ann. Sec. 60-3302 (1949), p. 14 *infra*. The reversal of the ruling of the trial court on petitioners' demurrer produced only the same effect as if the trial court had overruled the demurrer and directed the defendants to file an answer. In *Waddell* v. *Woods*, 160 Kan. 481, 483-84, 163 P.2d 348, 350 (1945), the court stated:

> "• • • When this court, upon appeal, merely reverses a district court on its ruling in connection with a de-

> murrer to a pleading and no judgment is directed in behalf of either party, the effect of the ruling by this court is the same for the purpose of further proceedings in the district court as if the district court had made the same ruling without an appeal to this court. Under such circumstances the district court is not divested of any discretion it may have in connection with the filing of subsequent pleadings and is not precluded from exercising further jurisdiction in the pending case. In such instance the doctrine of *res judicata* does not rise to any greater height or expand to any greater extent by reason of the ruling having been made by this court rather than originally made in the district court. * * *"

Petitioners' contention (Pet., p. 8) that the decision of the Kansas Supreme Court amounts either to the granting of a motion for summary judgment in plaintiffs' favor, or a declaratory judgment that the agency shop agreement in the instant case was invalid, is inaccurate and not supported by the authorities cited. *The Gas Service Co.* v. *The Consol. Gas Utilities Corp.*, 150 Kan. 715, 96 P.2d 608 (1939), held that an appeal may not be taken from an order overruling a motion for judgment on the pleadings where a demurrer which raised the same question of law had previously been overruled and no appeal had been perfected in time. *Kotwitz* v. *Gridley Motor Company*, 148 Kan. 676, 84 P.2d 903 (1938), involved a demurrer to the evidence interposed by the defendant at the conclusion of the plaintiff's evidence in a jury trial. The demurrer was overruled and, when the jury could not agree on a verdict, the defendant filed a motion for rehearing on the demurrer to the evidence and for a directed verdict. Both motions were denied by the trial court. Subsequently the action was dismissed without prejudice on plaintiff's motion and, when the defendant appealed from the order overruling the demurrer to the evidence, it was held that his right to appeal could not be cut off by the plaintiff's securing a dismissal of the action without prejudice. *The*

Union Pacific Ry. v. *Estes*, 37 Kan. 229, 15 Pac. 157 (1887), held merely that if, after an adverse ruling on a demurrer to a petition, the defendant files an answer, he must await the result of the trial before appealing the ruling on the demurrer. None of the cases cited by petitioners holds that a ruling on a demurrer is a final judgment as necessary for invocation of this Court's jurisdiction.

Furthermore, in its present posture the instant litigation involves only a temporary restraining order. By granting petitioners' motion to dismiss, the trial court merely vacated this temporary order. The Kansas Supreme Court reversed the trial court action. A state court order granting a preliminary, temporary, or interlocutory injunction is not a final judgment for purposes of review under 28 U. S. C. Sec. 1257. See *Montgomery Bldg. & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178 (1952), dismissing as improvidently granted a writ of certiorari to review affirmance of a temporary injunction.

II. THE DECISION OF THE SUPREME COURT OF KANSAS SOUGHT TO BE REVIEWED NEITHER DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT, NOR DECIDED SUCH A QUESTION IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, WITHIN THE MEANING OF RULE 19, PARAGRAPH 1(a) OF THIS COURT.

Petitioners' argument, variously phrased, is that the National Labor Relations Act (the "Act") precludes a state from prohibiting enforcement of the "agency shop" type of union security clause, the application of which was temporarily restrained in this case. Petitioner charges that the judgment of the Kansas Supreme Court decided a federal question of substance not heretofore determined by this Court and in a way probably not in accord with the appli-

cable decisions of this Court. Neither charge is correct. The substantive issue involved was presented and decided by this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Bd.*, 336 U. S. 301 (1949).

Algoma Plywood ruled that union security arrangements were not protected by the Act and that the states were therefore free to prohibit or restrict such arrangements. Since the operative facts in *Algoma Plywood* occurred prior to the 1947 Taft Hartley amendment to the Act which introduced Section 14(b), the decision was that neither Section 7 nor Section 8(a)(3) of the Act, on which petitioners here rely, in any way limited the right of a state to restrict or to prohibit any form of union security. In rejecting the precise argument set forth in the petition the Court stated (336 U.S. at 307):

> "It is argued, therefore, that a State cannot forbid what § 8(3) affirmatively permits. The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. . . ."

The Court viewed Section 14(b), added in 1947 by the Taft Hartley amendment, as confirming the rights of the states to impose restrictions on union security arrangements beyond those set forth in the Act. The opinion states (336 U. S. at 313-14):

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive. . . ."

The dissenting opinion in *Algoma Plywood* expressly recognized that even assuming the correctness of the pre-1947 administrative interpretation of Section 8(3) of the Act (rejected by the majority of seven justices but here pressed by petitioners), the addition of Section 14(b) by the 1947 Taft Hartley amendment removed any question as to the validity of state restrictions on union security arrangements, stating (336 U. S. at 325):

> ". . .The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. 61 Stat. 136, 151, 29 U. S. C. § 164. And the National Labor Relations Board has now construed the new federal Act as precluding such contracts to the same extent that they are precluded by state law. . . ."

Subsequent decisions of this Court citing and approving *Algoma Plywood* make clear that the states are free to prohibit or restrict union security arrangements. See, *e.g.*, *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 477 (1955); and *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1, 10 (1957). In the *Weber* case, the ruling in *Algoma Plywood* was summarized (348 U. S. at 477):

> "The Court allowed a State to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U. S. 301. Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State."

Both the rationale and the express language of *Algoma Plywood* make clear its holding decided that the Act in no way restricts the rights of the states to prohibit or restrict union security arrangements. See *supra*, p. 8. The maintenance of membership clause there involved and the agency shop provision considered in the instant case are

both types of such arrangements. Consequently the question of federal law petitioners characterize as novel has already been decided and the decision of the Kansas Supreme Court does not conflict with, but accords with that decision.

Only brief mention need be made of the subsidiary arguments advanced in the petition.

One is that leaving to the states the right to impose additional restrictions upon union security arrangements will result in a "crazy quilt and chaotic pattern" of bargaining and dissipate rights protected by Section 7 of the National Labor Relations Act (Pet., pp. 11-12). The short answer is that this Court and the many other tribunals which have considered this question over the past decade have ruled that this is precisely what Congress intended with respect to the area of union security arrangements.

Another is that the decision of the Kansas Supreme Court —and therefore *Algoma Plywood*—conflicts with recent decisions of this Court (Pet., pp. 9, 11, 12). But none of these decisions deals with the matter of union security arrangements here involved,* and none suggests any limitation upon the rights of the states to prohibit or regulate such arrangements or in any way impairs the authority of *Algoma Plywood*. Indeed, petitioners' repeated reliance upon *Hill* v. *Florida*, 325 U. S. 538 (1945), which antedated and was distinguished in *Algoma Plywood*, establishes that petitioners are again advancing the same arguments there made and rejected.

A third is that the "agency shop" arrangement here involved does not "require union membership as a condition of employment," and hence regulation of "agency shop" arrangements is not permitted by Sections 8(a)(3) and 14

* *Hill* v. *Florida*, 325 U. S. 538 (1945), concerned a state statute requiring licensing of business agents. *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953), and *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959), involved respectively an injunction against and damages assessed for picketing.

(b) of the National Labor Relations Act (Pet., p. 13). There are two complete answers. First, *Algoma Plywood* made clear that even prior to the introduction of Section 14(b) in 1947, the states were free to regulate all types of union security arrangements, one form of which is the "agency shop." Second, the opinions in *Algoma Plywood* above quoted and the rule of the National Labor Relations Board establish that Section 14(b) must, in view of its legislative history, be given a broad construction. In *Giant Food Shopping Center, Inc.*, 77 N. L. R. B. 791 (1948), decided prior to *Algoma Plywood*, the Board stated, *id.* at 793:

> "Section 14(b), therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce."

Finally, Petitioners contend that the Act ousts state courts of jurisdiction to prohibit enforcement of union security arrangements on the ground that the National Labor Relations Board "has taken the issue * * * in hand" (Pet., p. 13). But the obvious design of the Act is (a) to prohibit certain types of union security arrangements, a prohibition which the Board properly enforces; and (b) to permit the states to impose and enforce additional restrictions on union security arrangements if they so desire. The fact that the National Labor Relations Board acts within its jurisdiction to consider whether certain union security arrangements meet the standards prescribed by the Act—*i.e.*, are not prohibited thereby—is irrelvant to the issue. That issue is whether a state may impose additional limitations on union security arrangements; that it may do so and that the judgment of the Kansas Supreme Court accords with the Act and the decisions of this Court thereunder has been previously demonstrated. Petitioners' argument as to

"ousting jurisdiction" is a repetition of a contention made to this Court in *Algoma Plywood* and there rejected. See 336 U. S. at 314-15.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Pertinent statutes, in addition to those set forth in the petition (pp. 3-4) are as follows:

Kan. Gen. Stat. Ann. Sec. 60-705 (1949)

> "The defendant may demur to the petition only when it appears on its face, either: *First*, that the court has no jurisdiction of the person of the defendant, or the subject of the action. *Second*, that the plaintiff has no legal capacity to sue. *Third*, that there is another action pending between the same parties for the same cause. *Fourth*, that several causes of action are improperly joined. *Fifth*, that the petition does not state facts sufficient to constitute a cause of action."

Kan. Gen. Stat. Ann. Sec. 60-707 (1949)

> "When any of the defects enumerated in section 93 [60-705] do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

Kan. Gen. Stat. Ann. Sec. 60-758 (1949)

> "Upon a demurrer or motion being overruled, the party who demurred may answer or reply, if the court or judge be satisfied that he has a meritorious claim or defense, and did not demur or make such motion for delay."

Kan. Gen. Stat. Ann. Sec. 60-3101 (1949)

> "A judgment is the final determination of the rights of the parties in an action."

Kan. Gen. Stat. Ann. Sec. 60-3302 (1949)

"The supreme court may reverse, vacate or modify any of the following orders of the district court or a judge thereof, or of any other court of record except a probate court. *First*—A final order. *Second*—An order that discharges, vacates or modifies a provisional remedy; or that grants, refuses, vacates or modifies an injunction; . . . *Third*—An order that involves the merits of an action, or some part thereof. *Fourth*—. . . ."